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AN AGENT'S RIGHT TO SUE UPON CONTRACTS.

II.

SEC. 16.—AGENT ONLY MAY SUE ON SEALED CONTRACT OR NEGOTIABLE INSTRUMENT MADE WITH HIM PERSONALLY.—But where a contract under seal is made by the agent in his own name, there, in accordance with technical rules, the agent alone is the party in whose name a recovery upon it can be had.⁵⁸

So, for other reasons which have often been pointed out, actions upon negotiable instruments made in the agent's name only cannot be enforced by the principal in his own name.⁵⁹

SEC. 17.—AGENT'S RIGHTS DEPEND UPON THE CONTRACT.—The liability of third persons to an agent, upon a contract made with him, is to be ascertained by that contract alone, and cannot be enlarged by reference to any agreement between the agent and the principal by which their mutual rights are to be determined.⁶⁰

SEC. 18.—RIGHT OF ASSUMED AGENT TO SHOW HIMSELF PRINCIPAL.—The question of the right of one who has contracted in the character of an agent to throw off this character and show himself to be the real principal in the transaction, is one attended with no little difficulty. Every man has the right to determine for himself with whom he will deal, and he cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as

⁵⁸ *Shack v. Anthony*, 1 Maule & Sei. 573; *Berkeley v. Hardy*, 5 B. & C. 355; *Dancer v. Hastings*, 4 Bing. 2; *Cleary v. Heyward*, 123 N. Y. Supp. 334; *Buge v. Newman*, 61 Misc. 84, 113 N. Y. Suppl. 198, 132 App. Div. 928.

⁵⁹ See 2 *Daniels*, Neg. Inst. See. 1187.

⁶⁰ *Evrit v. Bancroft*, 22 Ohio St. 172. See *Tinsley v. Dowell*, 87 Tex. 23, 46 S. W. 946.

when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or relies upon the character or qualities of an individual, or has reasons why he does not wish to deal with a particular party. In all these cases, he may select the person to whom he will entrust the performance, and, having selected one, he cannot be compelled, against his will, to accept performance from another.⁶¹

It is obvious, also, that an attempt to enforce the performance of a contract which is purely executory, involves different considerations than an endeavor to recover from a third person the stipulated return for a performance fully executed by or on behalf of the agent. Equally manifest is it that the fact whether the agent assumed to act for a named, or for an unnamed principal, is an important element. These considerations suggest a division of the question thus: The right of an assumed agent to show himself to be the real principal: 1. Where he contracted for a named principal and the contract is, (a) executory, or (b) executed. 2. Where he contracted for an unnamed principal and the contract is, (a) executory, or, (b) executed.

SEC. 19.—1. (a).—A person who has assumed as the agent of a named principal, to pledge the performance of that principal to a third person, cannot, while the contract remains unperformed, insist upon substituting himself as the real principal, without the consent of the other party, in any case in which it may reasonably be considered that the skill, ability or solvency of the named principal was a material ingredient in the contract.⁶² If A contracts with B as the assumed agent of C for the personal services of C, B cannot, by offering to perform the contract himself, recover the stipulated compensation from A. This principle is too plain to require illustration.

1. (b).—A person who has assumed, as the agent of a named

⁶¹ *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Arkansas Smelting Co. v. Belden Co.*, 127 U. S. 379; *King v. Batterson*, 13 R. I. 117, 120; *Lansden v. McCarthy*, 45 Mo. 106; *Boulton v. Jones*, 2 H. & N. 564; *Schmaling v. Thormlinsen*, 6 *Taunt*, 147.

⁶² *Rayner v. Grote*, 15 Mees. & Wels, 359; *Schmaltz v. Avery*, 16 Ad. & El. (Q. B.) 655: "In many such cases such as, for instance, the case of contracts in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract, it is clear that the agent cannot then show himself to be the real principal, and sue in his own name; and perhaps it may be fairly urged that this, in all executory contracts, if wholly unperformed, or if partly performed without the knowledge of who is the real principal, may be the general rule." *Alderson, B.*, in *Rayner v. Grote*, *supra*, at p. 365.

principal, to pledge the performance of that principal to a third person, may, if the contract has been performed by himself as principal with the knowledge and express or implied consent of such third person, compel performance to himself on the part of such third person, although personal considerations may have entered into the making of the contract; but where such personal considerations are involved, he can not recover if the performance by himself as principal has been without the knowledge or consent of the other party.⁶³ If A contracts with B for the personal services of C, and B offers to perform and does perform as being himself C, with the knowledge and without the dissent of A—hence with A's implied consent—B may recover of A the stipulated compensation; but not if the performance

⁶³ In *Rayner v. Grote*, 15 M. & W. 359, it was held that where the plaintiff made a written contract for the sale of goods, in which he described himself as the agent of A, and the buyer accepted and paid the price of a portion of the goods, and had then notice that the plaintiff was himself the real principal in the transaction, and not the agent of A, the plaintiff might sue in his own name for the non-acceptance of and non-payment for the residue of the goods. In *Schmaltz v. Avery*, 16 Ad. & El. (Q. B.) 655, proof was given of a charter party expressed to be by defendant of one part, "and G. S. & Co. (agents of the freighter) of the other," and containing a memorandum as follows: "This charter being concluded on behalf of another party, it is agreed that all responsibility on the part of G. S. & Co. shall cease as soon as the cargo is shipped." No notice of this memorandum was taken in the declaration. G. S. & Co. were proved to be the plaintiff. *Held*: That notwithstanding the terms of the charter party, plaintiff might prove that he was the freighter, and his own principal, and, on proof of being so, was entitled to recover in his own name. In *Mudge v. Oliver*, 1 Allen (83 Mass.), 74, it was held that one who buys goods at a shop which has been occupied by a person who owes him, under the supposition that he is dealing with his debtor, but is informed before leaving the shop that another person has become the owner of the stock of goods there and is selling them on his own account, and makes no objection, but retains the goods, cannot afterwards resist an action for the price, although the vendor acquired them by a conveyance fraudulent as to the creditors of the original owner, and the purchaser himself was a creditor of such original owner. In *Orcutt v. Nelson*, 67 Mass. (1 Gray) 536, an order for goods was executed by the successor in business of the person to whom it was sent, and the goods forwarded by carrier and accepted on arrival, and freight paid by him who ordered them, with knowledge that the order had been filled by such successor. *Held*, that his assent related back to the original order, and that the sale was complete on delivery to the carrier. In *Barnes v. Shoemaker*, 112 Ind. 512, 14 N. E. 367, it was held that where goods ordered of one person are supplied by another, the appropriation thereof by the purchaser, after notice that they are so supplied, makes him liable, as he thereby ratifies the transaction, and the ratification relates back and gives the order the same effect as if it had originally been given to the person filling it. In *Bullock v. Ueberroth*, 121 Mich. 293, 80 N. W. 39, it was held that, where B sues upon a contract, wherein he appears as agent, under which money is payable to B & Co., he cannot recover without proving that he was doing business under the name of B & Co., or that B & Co. assigned the contract to him.

See also *Eggleson v. Boardman*, 37 Mich. 14; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93.

was without the knowledge—hence without the express or implied consent—of A.

SEC. 20.—Whether, where the contract cannot reasonably be considered to have been entered into from any consideration of personal skill, solvency of other personal reason, it is competent for one who has contracted as the assumed agent of a named principal, to show himself to be the real principal, and recover upon the contract, whether executed or executory, is not clear from doubt. It has been intimated in one or two cases,⁶⁴ that this might be done if notice of the true state of the case were given to the other party before the action was begun, but no case has been discovered in which this precise question was presented for adjudication, and no satisfactory reason is apparent which will permit one, who, in express terms, has made another than himself the party to the contract, by any mere notice to change the essential nature of the agreement, or be permitted to recover, as a party, when he has in terms made himself not a party.⁶⁵ The true rule would seem to be that it cannot be, in any case, while the contract remains executory, and that, if it can be done where the contract is executed, it can only be to the extent that the execution, by the assumed agent as the real prin-

⁶⁴ *Bickerton v. Burrell*, 5 *Maule & Sel.* 383; *Foster v. Smith*, 2 *Cold. (Tenn.)* 475, 88 *A.M. Dec.* 604.

⁶⁵ *Bickerton v. Burrell, supra*, is the leading case in this connection. There no notice had been given, and it was held that the action could not be maintained, but some of the judges intimated that their opinions would have been otherwise if such notice had been given. Mr. Bowstead expresses the opinion that the agent may probably sue in all cases where the identity of the contracting party is not a material element in the making of the contract, provided he gives notice to the other contracting party before action that he is the real principal. *Bowstead on Agency*, 3 ed., 401. He relies upon *Bickerton v. Burrell, supra*. Professor Huscuit was apparently of the same opinion. *Huscuit on Agency*, 2 ed., 259, also relying on *Bickerton v. Burrell*. Sir Frederick Pollock, after referring to *Bickerton v. Burrell*, says: "This leaves it doubtful what would have been the precise effect of the plaintiff giving notice of his real position before suing; but the modern cases seem to show that it would only have put the defendant to his election to treat the contract as a subsisting contract between himself and the plaintiff, or to repudiate it at once." He refers to the case of *Fellowes v. Lord Gwydyr*, 1 *Sim.* 63; affirmed, 1 *Russ. & M.* 83, wherein one who had a contract as agent for a named principal was granted specific performance of it in equity, the court acting upon the theory that it was just, since the defendant did not show that he had been prejudiced in any way. Sir Frederick Pollock expresses the opinion that this case is not the law. It was criticised by Gibson, C. J., in *Fisher v. Worrall*, 5 *Watts & Serg. (Pa.)* 478. And *Archer v. Stone*, before North, J., 28 *L. T. Rep.* 34, is opposed, though the facts in that case were somewhat different.

cipal, has been with the knowledge and consent of the other party.⁶⁶

SEC. 21.—2.—Where the contract is entered into by the assumed agent as agent for an unnamed principal, no personal considerations can ordinarily arise, because since no particular principal is named or known, no particular elements of skill, solvency or ability are involved.⁶⁷ In most of such cases, the words referring to a principal would, in accordance with established rules, be regarded as mere *descriptio personae*, or be rejected as surplusage. In such a case, the third person must be deemed to

⁶⁶ In *Whiting v. Crawford Co.*, 93 Md. 390, 49 Atl. 615, a broker, without authority, undertook to make a contract in behalf of a named principal, to sell certain goods to defendant. Later the broker's want of authority was discovered, and defendant said that he would hold the broker liable upon the contract. Afterwards the broker, upon his own credit, obtained from the seller named in the contract a quantity of the goods which were delivered to and accepted by the defendant. In an action by the broker in his own name to recover the price of the goods so delivered, *held*, that the broker could recover. The court relied upon *Rayner v. Grote*, *supra*, and also quoted from *Woodlyatt on Agency*, 106, a statement, "it seems that even though the professing agent names a principal, he will still be exclusively entitled to sue and be liable, if the other party, though knowing who the real principal is, nevertheless partly performs or accepts part performance of the contract."

Compare such cases as *New York Brokerage Co. v. Wharton*, 143 Iowa, 61, 119 N. W. 969, where it is held that where it appears that the apparent principal was only an agent, the real principal cannot have specific performance of the contract.

"It is indeed possible, as is pointed out in *Schmaltz v. Avery*, 16 Q. B. 655, that the other party may have been contented to take any principal other than the person who posed as agent and may have relied on the terms of the contract, indicating that the latter was an agent only, being willing to accept any one else, be he who he might, as principal. (Compare *Kayton v. Barnett*, 116 N. Y. 625, 23 N. E. 24.) In *Schmaltz v. Avery*, one who had made a charter party describing himself as "agent of the freighter," was permitted to show that he himself was the freighter, and to enforce the contract on his own account. The court, after using the language which has been substantially quoted above, namely, that the other party might have been relying upon there being some other person as principal, though he did not know or ask who he was, proceeded as follows: "After all, therefore, the question is reduced to this; whether we are to assume that the defendant did so rely on the character of the plaintiff as agent only, and would not have contracted with him as principal if he had known him so to be, and are to lay it down as a broad rule that a person contracting as agent for an unknown and unnamed principal is precluded from saying, I am myself that principal. Doubtless his saying so does in some measure contradict the written contract, especially the concluding clause, which says: 'This charter being concluded on behalf of another party,' etc.; for there was no such other party. It may be that the plaintiff entered into the charter party for some other party, who had not absolutely authorized him to do so, and afterwards declined taking it; or it may be that he intended originally to be the principal; in either case the charter party would be, strictly speaking, contradicted; yet the defendant does not appear to be prejudiced; for, as he was regardless who the real freighter was, it should seem that he trusted for his freight to his lien on the cargo. But there is no contradiction of the charter party if the plaintiff can be considered as filling two characters, namely, those of agent and principal. A man cannot in strict propriety of speech be said to be agent to himself, yet, in a contract of this description, we see no absurdity

be liable to some one, and as no one else is designated, it must be presumed that he is liable to the person who in fact sustained the relation of principal in the transaction, and this principal may as well be the assumed agent as a stranger. In either event, the rights of the third person are not impaired, because he has contracted to answer to any one who might be entitled.⁶⁸

in saying that he might fill both characters; that he might contract as agent for the freighter, whoever that freighter might turn out to be, and might adopt that character of freighter himself if he chose."

In *Harper v. Vigers* [1909], 2 K. B. 549, plaintiffs, describing themselves as "agents for owners," made a written contract with defendant to furnish him a ship to carry a cargo at a certain rate. Plaintiffs were not at that time the agents of any ship owner, and were in fact making a speculative contract on their own account. They then went to a certain ship owner and, describing themselves as "agents for merchants," made a contract for the use of his ship to carry the cargo in question at a lower rate. The cargo was duly carried and plaintiffs sued to recover the agreed rate from defendant. There were two defenses urged: (1) That plaintiffs could not maintain the action, and, (2) That in any event they could not recover more than they had paid the ship owner. Both objections were overruled, it being said that there was no distinction between this case and *Schmaltz v. Avery, supra*.

In *Rodliff v. Dallinger*, 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439, it is said by Holmes, J.: "There is no rule of law that makes it impossible to contract with or sell to an unknown but existing party. And if the jury find that such a sale was the only one purported to be made, the fact that it failed does not turn it into a sale to the party conducting the transaction. *Schmaltz v. Avery*, 16 Q. B. 655, only decides that a man's describing himself in a charter party as 'agent of the freighter' is not sufficient to preclude him from alleging that he is the freighter. It does not hint that the agent could not be excluded by express terms, or by the description of the principal, although insufficient to identify the individual dealt with, as happened here; still less, that in favor of third persons the agent would be presumed without evidence to be the undisclosed principal, although expressly excluded."

In *Sharman v. Brandt*, L. R. 6 Q. B. 720, on a contract of sale of goods within the Statute of Frauds, a broker who had signed a memorandum as broker for a principal not named, undertook to sue upon the contract in his own name. It was held that the action could not be maintained. If the contract were to be deemed a contract made on his own account, the memorandum, under the case of *Wright v. Dannah*, 2 Camp. 203, was insufficient, because the agent to sign must be a third person. Moreover, "the note does not describe the true contract as to the parties, which it must do; for it describes a contract between the broker on behalf of unnamed principals as sellers, and the defendants as purchasers; whereas, in reality, the plaintiff now says, the contract was between the broker as principal and the defendants."

In the case of *Paine v. Loeb*, 96 Fed. 164, 37 C. C. A. 434, plaintiffs, as brokers, entered into a contract for the purchase from defendant of certain bonds claiming to act for an undisclosed principal, and stipulating that they should in no manner be held liable on the contract, which, as they had reason to believe, was made by defendant under a misapprehension as to the value of the bonds. In fact, they were acting for themselves and there was no other principal. *Held*, that they could not maintain an action on the contract—not as agents for an undisclosed principal, because no such principal existed; nor as principals, because, by their fraudulent misrepresentations, they had secured immunity from liability on the contract as such, and estopped themselves from claiming rights which were correlative with such liability.

⁶⁸ See *Schmaltz v. Avery*, and cases, *supra*.

In cases of this nature, it is immaterial whether the claim be made while the contract remains executory or after it is fully executed. The other party is, of course, entitled to be informed as to who the real principal is, whether the agent or a stranger, that he may have opportunity to avail himself of any rights which he may have against such principal.

SEC. 22.—AGENT MAY RECOVER MONEY PAID BY HIM UNDER MISTAKE OR ILLEGAL CONTRACT.—Where an agent pays out the money of his principal to a third person under a mistake of fact, or for a consideration which fails, or as the result of fraud or misconduct of the payee,⁶⁹ or where he pays it upon a contract which subsequently proves to be illegal, if the agent was ignorant of its illegality at the time,⁷⁰ he may sue for and recover it in his own name. Such an action is, ordinarily, the only remedy by which an agent, who has parted with his principal's money

⁶⁹ Lord Mansfield laid down the rule in an early case as follows: "Where a man pays money by his agent, which ought not to have been paid, either the agent, or principal, may bring an action to recover it back. The agent may, from the authority of the principal; and the principal may, as proving it to have been paid by his agent." *Stevenson v. Mortimer*, Cowp. 805. This case is followed in *Holt v. Ely*, 1 El. & Bl. 795. Here L placed in plaintiff's hand a fund, out of which plaintiff was directed to satisfy certain acceptances; defendant falsely represented to plaintiff that he held one such acceptance, and thereby induced plaintiff to pay him the amount of the alleged acceptance out of the fund. *Held*, that plaintiff might maintain money had and received against defendant. In *Colonial Bank v. Exchange Bank of Yarmouth*, 11 L. R. App. Cases, 84, the plaintiff bank being under instructions from R to remit his moneys to a bank at Halifax, through the mistake of its agents paid them to a New York bank for transmission to the defendants, who, on being advised thereof, debited the New York bank and credited R in account with the amount therof, and being afterwards advised of the mistake claimed to retain and use the moneys in reduction of R's account with them. *Held*, that on being advised of the mistake the defendants were bound to repair it, and that the plaintiff bank had a sufficient interest in the moneys to recover them as moneys received to their use.

In *Langstroth v. Toulmin*, 3 Stark. 145, A becomes the purchaser of an estate sold by the defendant at a public auction, and signs a memorandum of agreement, in which he is described as the agent of M. N. The supposed principal afterwards repudiates the contract; and after notice of the fact to the agent of the vendor, A pays the deposit money, according to the condition of the sale. Upon its turning out that the title is defective, A is entitled to recover the deposit in his own name.

⁷⁰ *Oim v. Bruce*, 12 East, 225. In this case an insurance had been made on goods from a port in Russia to London, by an agent residing in London, for a Russian subject. The insurance was in fact made after the commencement of hostilities between Russia and England, but before knowledge of it reached London, and after the ship had sailed and been confiscated. At the trial Lord Ellenborough ruled that the agent having effected the insurance without any consciousness of its illegality at the time, was entitled to recover back the premium paid, as money had and received by the defendant to the plaintiff's use, and without consideration as the risk never attached.

under a mistake of fact, and for which he is answerable to his principal, can reimburse himself.⁷¹

In such cases, however, as will be seen, the principal, being the party to whom the money belongs, and for whose benefit it is to be recovered, may ordinarily sue instead of the agent.⁷²

Thus an agent who, not being authorized to exchange money of his principal in his hands, has so exchanged it and received in exchange a worthless counterfeit bill, may maintain an action in his own name to recover the money paid out by him.⁷³

But an agent who has carelessly or mistakenly sold the property of his principal, entrusted to him for sale, for less than the proper price, the purchaser not being in fault, cannot recover of such purchaser the difference between the selling price and the real price, although the agent may have paid such difference to his principal in the settlement of the mistake.⁷⁴

SEC. 23.—WHAT DEFENSES OPEN TO THIRD PERSON.—
"Where the agent sues in his own name," says Mr. Evans,⁷⁵ "the defendant may avail himself of all defenses which would be good at law and in equity:—

"(a) As against the agent who is the plaintiff on the record,⁷⁶ or

"(b) As against the principal for whose use the action is brought, provided, of course, a principal exists."⁷⁷

⁷¹ Kent v. Bornstein, 12 Allen (Mass.), 342; Parks v. Fogelman, 97 Minn. 157, 105 N. W. 560.

⁷² Stevenson v. Mortimer, *Cowp.* 805.

⁷³ Kent v. Bornstein, *supra*. In such a case it is not necessary to tender back the worthless bill before bringing the action.

⁷⁴ Hungerford v. Scott, 37 Wis. 341.

⁷⁵ Ewell's Evans on Agency, 387.

⁷⁶ In Gibson v. Winter, 5 B. & Ad. 96, it was held that where a broker, in whose name a policy of insurance under seal was effected, brought covenant, and the defendants pleaded payment to the plaintiff according to the tenor and effect of the policy, and the proof was, that after the loss happened, the assurers paid the amount to the broker by allowing him credit for premiums due from him to them, it was held that although that was no payment as between the assured and assurers, it was a good payment as between the plaintiff on the record and the defendants; and, therefore, an answer to the action.

See also Leeds v. Marine Ins. Co., 6 Wheat. (U. S.) 565.

In the case of Bauerman v. Radenius, 7 D. & E. 659, it was held that, in an action in the name of the agent for the principal's benefit, an admission of the agent is admissible evidence.

⁷⁷ In Grice v. Kendrick, L. R., 5 Q. B. 340, the plaintiff, an auctioneer, was employed by W to sell certain goods by auction. W was indebted to the defendant in 60 l., and before the sale it was agreed between W and the defendant that any goods the defendant might buy at the auction should go

SEC. 24.—So far as the matter of set-off is concerned, set-off being the creature of statute, much depends upon the precise language of the statute. The English statute provided "that where there are mutual debts between the plaintiff and the defendant" one may be set-off against the other. Under this statute it was held, that in order to enable the debt to be set-off it must be a debt due to the defendant from the plaintiff, and, therefore, that a debt due from the plaintiff's principal could not be set-off;⁷⁹ and other cases have involved a similar ruling.⁸⁰ On the other hand there are cases holding that the right of set-off does not depend upon the technical identity of the parties, but upon their identity in interest; and, therefore, that where the agent sues in reality for the principal's benefit a debt due from the principal to the defendant may be set-off.⁸¹ Such a set-off.

in payment of his claim against W. The plaintiff had no notice of this agreement at the time of the sale. The defendant bought several lots, to the amount of 49 l., and the plaintiff allowed him to take them away on the faith of his paying for them, but the defendant supposed he was taking them in pursuance of his agreement with W. The day after the sale the plaintiff paid W 90 l. on account of the sale. Afterwards the defendant informed the plaintiff of the agreement between the defendant and W; and after this notice, the plaintiff, on the demand of W, paid over to him the balance due on the sale, about 100 l., after deducting his, the plaintiff's, commission and charges as auctioneer. The plaintiff then sued the defendant in the county court for the amount of his purchases at the sale. *Held*, that the defendant was entitled to the verdict.

In Holden v. Rutland R. R. Co., 73 Vt. 317, 50 Atl. 1006, the court, laying down the rule "that if the action is brought by the agent in his own name the defendant may avail himself of those defenses which are good against the agent who is the plaintiff on the record; also of any defense that would be good against the principal in whose interest the action is brought," *held*, that, where the agent of an undisclosed principal had bought a mileage book of the defendant railroad and had sued in case for the alleged negligence of the ticket agent in inserting the name of the purchaser, whereby the plaintiff had been denied the right to use the ticket which he had borrowed from his principal and had been ejected from the train, the railroad company might make the defence against the plaintiff that the principal had in the meantime made or consented to the making of a fraudulent alteration of the ticket by inserting the name of an additional party in violation of the terms of the ticket.

In Bierce v. State Nat. Bank, 25 Okla. 44, 105 Pac. 195, in an action by a national bank upon a note, the defendant sought to show that the bank was merely agent of the original payee, and to recover against the bank a claim which defendant held against the payee, greater in amount than the amount due upon the note. *Held*, that no such claim could be allowed.

⁷⁹ Isberg v. Bowden, 8 Ex. 852. In Tagart v. Marcus, 36 Weekly Rep. 469, it was held that in an action of trover and for goods sold and delivered, a defendant cannot set-off a claim for unliquidated damages which he has against a third party on another transaction, although the third party happens to be the plaintiff's principal.

⁸⁰ For example, see Alsop v. Caines, 10 Johns. (N. Y.) 396, a case decided under the Act of 1801, giving a right of set-off "if two or more persons dealing together be indebted to each other."

⁸¹ In Bliss v. Sneath, 103 Cal. 43, 36 Pac. 1020, under a statute confining the right to claims held by the defendant against the plaintiff, a claim existing

however, as has been already seen, would not be allowed where the agent, *e. g.*, a factor making advances to his principal upon the security of goods and their proceeds, has a lien or interest which would be defeated or impaired by the set-off.⁸¹

SEC. 25.—Admissions made by the principal have been held to be available to the defendant where the action was for his benefit though brought in the agent's name;⁸² and it has also been held that where the agent of the principal residing abroad brings an action in his own name on a contract made with him as agent, the defendant is entitled to discovery to the same extent as if the principal were a party to the action, and to have the action stayed until such discovery is made.⁸³

SEC. 26.—WHAT DAMAGES AGENT MAY RECOVER ON CONTRACT.—Where the action is brought by the agent upon the contract, he may, unless the principal intervenes, recover the full measure of damages for its breach, in the same manner as though the action had been brought by the principal.⁸⁴ The fact that the damages, when recovered, will belong to the principal does not affect this right.⁸⁵

But where the principal intervenes, the agent, when permitted to sue at all, can only recover to the extent of his special interest, by virtue of which the action is maintained.

Floyd R. Mechem.

The University of Chicago.

against the plaintiff's principal was held to be available. The rule quoted in the text from Evans on Agents was quoted and relied upon. In *Hayden v. Alton National Bank*, 29 Ill. App. 458, under a statute permitting set-off of claims held by the defendant against the plaintiff, it was held that where an agent who had deposited his principal's money in a bank in the name of "A. agent," sued to recover it, the bank might set-off a claim which it held against the agent's principal.

⁸¹ *Young v. Thurber*, 91 N. Y. 388.

⁸² *Smith v. Lyon*, 4 Camp. 465; *Welstead v. Levy*, 1 Mood. & R. 138.

⁸³ *Willis v. Baddeley* (1892), 2 Q. B. 324. This case was distinguished and not followed in *Nelson v. Nelson Line* (1906), 2 K. B. 217, on the ground that in the latter case the plaintiffs were not merely nominal parties suing for the benefit of the real parties in interest from whom discovery was sought, but were parties who had a real and substantial interest of their own in the action. Compare *Queen v. Glyn*, 7 Cl. & Fin. 466, where it is said there can be no discovery against a person not a party to the record though charged to be the sole party in interest.

⁸⁴ *Groover v. Warfield*, 50 Ga. 644; *United States Tel. Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519; *Joseph v. Knox*, 3 Camp. 320; *Gardiner v. Davis*, 2 C. & P. 49; *Dancer v. Hastings*, 4 Bing. 2.

⁸⁵ Conversely, the agent ordinarily cannot recover more than the principal could recover if the action were brought in his name. *Evrit v. Bancroft*, 22 Ohio State, 172.

⁸⁶ *Groover v. Warfield, supra; United States Tel. Co. v. Gildersleeve, supra.*